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No. 424

In the Supreme Court of the United States

OCTOBER TERM, 1929

IKE DANOVITZ, SURVIVING PARTNER OF FEITLER BOTTLE COMPANY, CLAIMANTS, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 63) is reported in 34 F. (2d) 30.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 19, 1929. (R. 70.) The petition for certiorari was filed September 26, 1929, and was allowed by this Court November 4, 1929. (R. 71.)

QUESTION PRESENTED

When this Court allowed the writ of certiorari, it limited argument to this one question:

Whether barrels, bottles, corks, labels, cartons, capping machines, whiskey siphons, filters, etc., seized in connection with whiskey and whiskey chips, may be property designed "for the manufacture of liquor intended for use in violating this title," within the meaning of Section 25, Title II, of the National Prohibition Act.

STATUTE INVOLVED

Section 25, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315 (U. S. C., Title 27, Sec. 39), provides, so far as material here:

> It shall be unlawful to have or possess any liquor or property *designed for the manufacture of liquor intended for use in violating this title* or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. * * * (Italics ours.)

STATEMENT

The Government, by libel, sought forfeiture of claimants' property under Section 25, Title II, of the National Prohibition Act. The libel (R. 2–6) alleged a lawful seizure "at a place known as 1026-1028 Watson Street, Pittsburgh, Pennsylvania," of a quantity of liquor and of certain "property and material designed for the manufacture of contraband liquors." This property comprised—

Whiskey, whiskey chips, and whiskey barrels all containing whiskey chips; gin extract, gin bottles, and gin bottle caps; cans, jugs, demijohns, crocks, and empty bottles of all sizes, some in paper cases; bottle cartons, and cartons for whiskey bottles; corks, bottle caps, and Viscose caps; wrappers for whiskey bottles and assorted whiskey labels; cardboard fillers, cases, and bottle separators; paper bags, wrapping paper, and twine; sealing wire; labeling and crimping machines; siphons and filters; clyco, glycerine, syrup, and flavoring nuts.

By answer (R. 6–11), petitioner and one Manfred Feitler denied that this property was "contraband, or designed for the manufacture of contraband liquors, or held or used in violation of Section 25, Title II, of the National Prohibition Act or other laws." The issues were tried by the court without a jury. (R. 1.) Trial by jury *was not* waived in writing.

Following testimony by claimants, the court found that the allegations of fact in the libel had been sustained, and decreed forfeiture as prayed for. (R. 50, 56.) Upon appeal, the decree was affirmed by the Circuit Court of Appeals. (R. 70.)

SUMMARY OF ARGUMENT

Since there was no written waiver of jury, the review is limited to questions of law presented by the record proper. Proof of design is consequently not reviewable. The libel being sufficient, the only question is whether the property may be usable for "manufacture of liquor intended" for illegal use, that is, whether it is used in, or after, the manufacture.

The policy of the National Prohibition Act is to make the term "manufacture" inclusive. Within the meaning of the Act, it is submitted, no article is to be considered manufactured until put into condition for sale upon the market for the purpose for which it was intended to be used.

Section 25 emphasizes "liquor intended for use in violating this title," and indicates preparation for a market, as for a bottled trade, where descriptive bottles and caps are in the nature of a guaranty of genuineness.

In previous control of liquor, Congress has always treated preparing for the market as an incident of manufacture. Statutes affecting other

commodities recognize packing as an incident of manufacture.

Other parts of the National Prohibition Act indicate that manufacture includes preparation for the market. Thus, certain articles are excepted only when made and put up in containers as prescribed. With others, there is a line of demarcation between manufacture and sale, giving full control over manufacture and limited control over sale. The former ends "after having been manufactured and prepared for the market."

Liberally construed, the word "manufacture" includes preparation for the market, to which purpose this property was readily adaptable.

Under some Tariff Acts this Court has held that bottles and corks were not materials used in the manufacture of beer. These decisions are not controlling.

ARGUMENT

I

THE MEANING OF "MANUFACTURE" IS BEFORE THE COURT BUT THE QUESTION OF DESIGN IS NOT

This case arose on forfeiture proceedings based on a seizure on land; i. e., "at a place known as 1026–1028 Watson Street, Pittsburgh, Pennsylvania" (R. 2), tried to the court without a written waiver of a jury.

Ever since *The Sarah,* 8 Wheat. 391, it has been settled that the trial of all forfeiture cases of seizure on land is at common law and normally is before

a jury. And if such cases are tried in the District Court without written waiver of jury, an appellate court is limited to a consideration of such questions of law as may be presented by the record proper, such as whether the pleadings were sufficient to support the judgment. *Kearney* v. *Case,* 12 Wall. 275; *Campbell* v. *United States,* 224 U. S. 99, 106; *Road District* v. *St. Louis S. W. Ry. Co.,* 257 U. S. 547, 562; *Duignan* v. *United States,* 274 U. S. 195, 198–199.

One of petitioner's contentions is that, even if the seized articles are considered as useful for "manufacture," the forfeiture was improper in the absence of a proved intention so to use them. But this is not now subject to review. The trial court found that the allegations of fact—that the property was "designed for the manufacture of contraband liquors"—had been sustained. (R. 50.) Under the circumstances, neither this Court nor the Circuit Court of Appeals can properly consider the bill of exceptions. *Rogers* v. *United States,* 141 U. S. 548, and cases cited *supra.*

There is no serious question of the sufficiency of the libel as a pleading. It alleged that certain property, described in detail, was "designed for the manufacture of contraband liquors." Except that "contraband liquors" was used instead of the statutory phrase "liquor intended for use in violating this title," the allegations of the libel were in the language of the statute (Section 25, Title II).

They were, therefore, sufficient. *Coffey* v. *United States,* 116 U. S. 427; *Avignone* v. *United States* (C. C. A., 2d), 12 F. (2d) 509; *United States* v. *385 Barrels, Etc. of Wine* (S. D., N. Y.), 300 Fed. 565. The substituted phrase was treated in the trial court as the equivalent of the statutory phrase and it is therefore sufficient here. *Campbell* v. *United States, supra,* p. 106.

Moreover, as the order of this Court granting the petition for certiorari contained the limitation that counsel should confine themselves "to the question whether the property seized is forfeitable under Section 25, Title II of the National Prohibition Act," it would seem that it is not open to the petitioner to question the sufficiency of the libel or the legality of the proceedings under which the property was seized. 280 U. S. 28A.

The only question presented by the record proper, therefore, is whether, as a matter of law, property of the kind described can not be used for the "manufacture of liquor intended" for illegal use. Petitioner contends that the acts of bottling, labeling, etc., can not be a part of manufacture, while the Government asserts that these acts may be a part of a manufacture for an intended illegal use, such as sale.

II

AS USED IN THE NATIONAL PROHIBITION ACT, "MANUFACTURE" WAS INTENDED TO INCLUDE PREPARING FOR THE MARKET

The word "manufacture" has been given a variety of meanings by judicial construction. The

courts have held: That baling of cotton is not manufacture (*City of Memphis* v. *St. Louis & S. F. R. Co.* (C. C. A., 6th), 183 Fed. 529, 539); that lumber for crates is not material on hand for the purpose of manufacture (*City of Henderson* v. *George Delker Co.*, 193 Ky. 248); that putting up spices for sale is not manufacture (*People* v. *Roberts*, 145 N. Y. 375); and that bottles and corks are not materials (i. e., ingredients) used in the manufacture of bottled beer (*Jos. Schlitz Brewing Co.* v. *United States*, 181 U. S. 584). On the other hand, it is said: That maraschino cherries, flavored, bottled, and labeled for the market are manufactured (*In re I. Rheinstrom & Sons Co.* (E. D. Ky.), 207 Fed. 119; *Central Trust Co.* v. *George Lueders & Co.* (C. C. A., 6th), 221 Fed. 829); that canners are manufacturers (*Phillips* v. *Byers*, 189 Cal. 665; *Nixa* v. *Lehmann*, 70 Kans. 664); and that a person, standing among jars of whiskey, alcohol, and water and pasting whiskey labels on bottles, is manufacturing liquor (*Rouda* v. *United States* (C. C. A., 2d), 10 F. (2d) 916). And in *United States* v. *One Lot of Intoxicating Liquor* (S. D. Texas), 27 F. (2d) 903, cans, crocks, bottles, and caps were forfeited as property designed for the manufacture of liquor.

Courts have experienced difficulty in determining what is included within the term "manufacture." *City of Louisville* v. *Zinmeister & Sons*, 188 Ky. 570. Indeed, *Central Trust Co.* v. *George Lueders & Co.*, *supra*, and *P. Lorrilard Co.* v. *Ross*, 183 Ky.

217, after reviewing the numerous decisions delineating it, recognize a contrariety of construction. Definitions of the lexicographers being of little aid, the term must be applied to the particular facts so as to effectuate the intent with which it was used in the statute. *Standard Tailoring Co.* v. *City of Louisville,* 152 Ky. 504. "The tendency of modern decision has been to appreciably expand the formerly prevailing definition of 'manufacture.'" *Central Trust Co.* v. *George Lueders & Co., supra,* p. 838. In the *Lorrilard case, supra,* it was said (p. 223):

> Numbers of cases may be found in which the courts have defined the words "manufacture," "manufacturer," "manufacturing," "manufactured," but in all these cases the courts constantly kept in mind the purpose of the legislation and endeavored to give such a construction to these words as would carry out the legislative intent, and on account of this inclination different meanings have been ascribed to the words; but it may safely be said that *the general rule is that no article is considered manufactured until it has been put into condition for sale on the open market for the purpose for which it was intended to be used.* (Italics ours.)

The sense in which the word "manufacture" is used in the National Prohibition Act depends, therefore, upon the intent of Congress, which, in turn, must be ascertained by the usual methods of statutory construction.

The policy of Congress respecting the subject-matter of the whole Act should be considered. *Richardson* v. *Harmon*, 222 U. S. 96. This Court has already decided that the purpose of both the Eighteenth Amendment and of the Act was "to stop the whole business" in so far as beverage liquor was concerned (*Grogan* v. *Walker & Sons*, 259 U. S. 80, 89); that the Act aimed to suppress "the entire traffic" in intoxicating liquor as a beverage (*United States* v. *Katz*, 271 U. S. 354, 357); and that it was both comprehensive and disclosed an intent fully to enforce the prohibition therein declared (*Donnelley* v. *United States*, 276 U. S. 505, 513).

In keeping with this policy, "manufacture" was used in its most inclusive sense. It was intended to prohibit all manufacture, except for the permitted purposes, and to reach all stages in the actual process up to and including the finished product in whatever condition that might be. The prohibition against possession of property designed for the manufacture of liquor was intended to reach all steps in the same process. Necessarily, it included the ultimate product as and when fashioned for sale or other disposition. This intention is emphasized by the descriptive phrase "liquor intended for use in violating this title." Such intended illegal uses undoubtedly meant (1) possession for beverage purposes, (2) transportation, (3) sale, and (4) export. That part of the process which prepared the article for any of these uses would, then, obviously be within the scope of manufacturing it

(i. e., making it ready) for that particular use. And "having regard to the artifices which are used to promote the sale of intoxicants" (*Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 205), Congress undoubtedly anticipated that synthetic and imitation liquors would be bottled, labeled, and packed for a market in which they could, with some semblance of verity at least, be there extolled as the work of the old masters. That imitations were recognized long before prohibition, is indicated in *Woolner & Co.* v. *Rennick* (S. D., Ill.), 170 Fed. 662, 664:

> That there is a product called "whisky," and also a product called "imitation whisky," the law itself clearly contemplates, and section 3244 (U. S. Comp. St. 1901, p. 2096), in defining what is meant by the business of rectifying, denominates the maker of imitation whisky and other imitation liquors as a rectifier * * *.

While not at this time interested in the possible fraud on the public or in misbranding, Congress undoubtedly intended to prohibit the manufacture of liquor intended for this kind of sale as well as for any other purpose prohibited by Title II. So, in this aspect, "liquor intended for use in violating this title" is equivalent to "liquor intended for illegal sale"—a class of liquor which no one will contend that Congress did not mean to abolish. And manufacture becomes, then, more than a mere making of liquor, for, as this Court said in *Carroll* v. *United States*, 267 U. S. 132, 154:

> The mere manufacture of liquor can do little to defeat the policy of the Eighteenth Amendment and the Prohibition Act, unless the forbidden product can be distributed for illegal sale and use.

It is, furthermore, reasonable and sensible to assume that Congress used the word "manufacture" to include the preparation of liquor for a trade which demanded bottled goods. A select trade may require as much of any manufacturer; and he is still a manufacturer when he prepares his product to meet that demand. When the National Prohibition Act was passed, it was not uncommon to use labels and bottles of well-known shapes and designs for many liquors. They had a value to the manufacturer and the product was prepared in such manner as to capitalize that value for him. It had come to be a basic principle in trade-mark jurisprudence. "All the world should be enabled to test the genuineness of goods by the mark placed upon them." Browne, Law of Trade Marks, 1873, p. 52. The courts have recognized it as a manufacturer's asset, *Coca-Cola Co.* v. *J. G. Butler & Sons,* 229 Fed. 224, 230, saying that descriptive bottles and caps are an assurance that the article has been put up under the manufacturer's supervision and direction. *People* v. *Luhrs,* 127 App. Div. (N. Y.) 634, 635, applied it to whiskey:

> The trade-mark and label guarantees that the whisky in the bottle has not only been manufactured by the Wilson Distilling Company,

but that the contents of the bottle have been placed in that identical bottle by the said company.

It was not unreasonable, then, that Congress should have intended to include bottling, labeling, and packing in manufacture.

The Eighteenth Amendment forbids manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes. Intending to make these prohibitions effective, Title II used the same generic terms of proscription. And since Congress acted most comprehensively, it must be assumed that it intended to exclude neither the process of barreling, bottling, capping, and labeling of liquor—a well-recognized part of the forbidden traffic—nor the property usable therefor. Being, concededly, not transportation, or importation, or exportation, the act of barreling, bottling and capping, or labeling liquor must come within the purview either of manufacture or of sale. It could hardly be included in sale, for it may be, and often is, completely finished before there is even an offer of sale. And sale, having a well-defined meaning, never embraces those things which antedate an offer of sale. But it is fair to say that all acts necessary to prepare liquor for sale—from the assembling of the utensils and ingredients to the finishing of the product, bottled or barreled as the case may be, and labeled as desired—are included in the manufacture. Those things

which a manufacturer customarily does before sale may reasonably be said to be manufacture. For instance, the manufacturer of breakfast food puts the commodity in a sealed package ready for use. The manufacturer of paints puts the paint in a labeled can. The manufacturer of carbonated soft drinks puts the flavored liquid in air-tight bottles. Indeed, the manufacturer of any liquid must bottle his product to preserve it against evaporation. These illustrations may be multiplied indefinitely.

Neither the Amendment nor the Act contemplated a hiatus in controlling the liquor from its origin to the time it reaches the ultimate consumer. Barreling, bottling, capping, and labeling, not being a part of the sale, must be a part of manufacture.

Considering the control of liquor in previous legislation as a guide to legislative intent (*United States* v. *Katz, supra,* p. 357), it should be observed that barreling, bottling, marking, stamping, and labeling not only devolve upon the manufacturer but they were not uncommonly treated by Congress as a part of the process of preparing for the market. And as such an incident of manufacture, these acts were closely regulated and controlled.

Upon coming from the cistern, the whiskey is required to be drawn into casks or packages, marked and stamped in a certain manner, and then removed to the warehouse for aging. Section 3287 R. S., as amended (U. S. C., Title 26, Sec. 367). It is a matter of common knowledge, and therefore judicially known, that whiskey "is not ready to be

marketed for consumption when it is drawn from the still" but must undergo an aging process, for which purpose it is kept in store for several years (*Taney* v. *Penn Bank*, 232 U. S. 174, 184), and that it is stored in barrels charred on the inside (*Paul Jones & Co.* v. *Mayes* (W. D., Ky.), 265 Fed. 365). The barrel soakage is discussed in *Hunter* v. *E. S. Corning & Co.* (C. C. A., 7th), 86 Fed. 913. This aging process is imposed upon the distiller, who must keep the whiskey, at his own expense, at a "warehouse, to be situated on and to constitute a part of his distillery premises." Section 3271 R. S. (U. S. C., Title 26, Sec. 361). During this time it may be completely distilled, but it is not yet completely manufactured for the trade.

After thus aging, the whiskey was controlled by the Bottling in Bond Act of March 3, 1897, c. 379, 29 Stat. 626 (U. S. C., Title 26, Sections 411–417). This legislation indicated that Congress recognized trade usages, knew that whiskey was made, aged, stored, and withdrawn for certain trade purposes, and accordingly regulated the business with a proper perspective of the extremely close relation between distilling on the one hand and bottling, labeling, and packing on the other. It provided:

> SEC. 1. That whenever any distilled spirits * * * have been duly entered for withdrawal upon payment of tax, or for export in bond, and have been gauged and the required marks, brands, and tax-paid stamps or export stamps, as the case may be, have

been affixed to the package or packages containing the same, the distiller or owner of said distilled spirits, if he has declared his purpose so to do in the entry for withdrawal, which entry for bottling purposes may be made by the owner as well as the distiller, may remove such spirits to a separate portion of said warehouse which shall be set apart and used exclusively for that purpose, and there, under the supervision of a United States storekeeper, or storekeeper and gauger in charge of such warehouse, may immediately draw off such spirits, bottle, pack, and case the same: * * *.

Every bottle when filled shall have affixed thereto and passing over the mouth of the same such suitable adhesive engraved strip stamp as may be prescribed, as hereinafter provided, and shall be packed into cases to contain six bottles or multiples thereof, and in the aggregate not less than two nor more than five gallons in each case, which shall be immediately removed from the distillery premises. Each of such cases shall have affixed thereto a stamp denoting the number of gallons therein contained, such stamp to be affixed to the case before its removal from the warehouse, and such stamps shall have a cash value of 10 cents each, and shall be charged at that rate to the collectors to whom issued, and shall be paid for at that rate by the distiller or owner using the same.

And there shall be plainly burned on the side of each case, to be known as the Government side, the proof of the spirits, the regis-

tered distillery number, the State and district in which the distillery is located, the real name of the actual bona fide distiller, the year and distilling season, whether spring or fall, of original inspection or entry into bond, and the date of bottling, and the same wording shall be placed upon the adhesive engraved strip stamp over the mouth of the bottle. * * *

SEC. 3. That all distilled spirits intended for export under the provisions of this Act shall be inspected, bottled, cased, weighed, marked, labeled, stamped, or sealed in such manner and at such time as the Commissioner of Internal Revenue may prescribe; * * *.

Because either the distiller or the owner may do the bottling, it may be asserted that this Act is not indicative of a purpose to subjoin the bottling to the manufacturing of whiskey. However this may be, Congress has plainly indicated that the kind of package and the kind of label are important in determining what kind of manufactured liquor it is (whether distilled or rectified) and accordingly how the manufacturer thereof shall be taxed. Thus, Section 605, Revenue Act of 1918, c. 18, 40 Stat. 1057, 1108, provided that all distilled spirits "not contained in the *distillers' original stamped* packages, or in bottles or other containers bearing the *distillers' original labels,* shall * * * be regarded as rectified spirits." (Italics ours.)

True, there must be some spatial separation between the distillery and the warehouse (Section

3287 R. S.; U. S. C., Title 26, Sec. 367), and in the case of beer, between the brewery and the bottling house (Section 3354 R. S., as amended; U. S. C., Title 26, Sec. 525); but this is intended as a protection against fraud on the revenue and not as a dividing line between a manufactured product and an unmanufactured product.

In like manner, when Congress regulated the production of other commodities, the packing of the article has always been treated as an incident of its manufacture. Thus, a "manufacturer" of cigars is required to pack his cigars and cigarettes in a certain manner. (Section 3392 R. S.; U. S. C., Title 26, Sec. 828.) The same requirement is placed upon a "manufacturer" of cigarettes. (Section 700 (d), Revenue Act of 1918, c. 18, 40 Stat. 1057, 1117.) So, too, certain commodities "shall be *packed by the manufacturer* thereof" in certain kinds of packages or containers, viz., oleomargarine (Act of October 1, 1918, c. 178, 40 Stat. 973, 1008; U. S. C., Title 26, Sec. 543); adulterated butter (Section 4, Act of May 9, 1902, c. 784, 32 Stat. 193; U. S. C., Title 26, Sec. 573); filled cheese (Section 6, Act of June 6, 1896, c. 337, 29 Stat. 253; U. S. C., Title 26, Sec. 604); phosphorus matches (Section 3, Act of April 9, 1912, c. 75, 37 Stat. 81; U. S. C., Title 26, Sec. 663); and manufactured tobacco (Section 3362 R. S., as amended; U. S. C., Title 26, Sec. 769).

Furthermore, in the definition of rectifiers, Congress especially recognized that in the manufacture of imitation liquors the name under which they

were to be sold formed a component part of the manufacture. Section 3244 R. S. (U. S. C., Title 26, Sec. 204) provides:

> * * * every person who, without rectifying, purifying, or refining distilled spirits, shall, by mixing such spirits, wine, or other liquor with any materials, manufacture any spurious, imitation, or compound liquors for sale, under the name of whiskey, brandy, gin, rum, wine, spirits, cordials, or wine bitters, or any other name shall be regarded as a rectifier * * *.

Even the National Prohibition Act, in parts other than Section 25, reflects the close association with which Congress viewed the actual making and the bottling, labeling, and packing of liquor. As stated above, when Congress prohibited the manufacture of liquor and of property designed for its illegal manufacture, it intended to reach all steps in the actual process up to and including the finished product. Hence, the word "manufacture" was used in its broadest sense, without qualification or amplification. But in addition to its prohibitions, the Act permitted certain things to be manufactured. In permitting this, it not only made due allowance for the broadest use of the term but also regulated the various phases of manufacture.

Thus, in Section 1, Title II, dealcoholized wine and any beverage made by the process by which beer, ale, porter, or wine is produced, are excepted

from the statutory definition of intoxicating liquor. But this is only when it "is made as prescribed * * * and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers" as may be prescribed.

Section 4, Title II, indicates the dividing line between the completed manufacture and the sale and should, therefore, delineate the ultimate in "manufacture" as used throughout the Act. By Section 4, Congress retained the broadest regulatory control over the manufacture of the articles named, in marked distinction to the control of their sale only when they are diverted to beverage uses. To this end, it provides that certain articles "*after having been manufactured and prepared for the market,*" shall not be subject to the provisions of the Act unless thereafter they are sold for beverage purposes. This close control over manufacture is in keeping with the policy of Congress, based on years of experience in regulating the manufacture of taxable articles. It was fitting that the control should be extensive, not restrictive. The same is true of manufacture for illegal uses and of the control of property designed for such manufacture. Here too, the term should be extensive, including all steps in the process, up to and including the preparation for the market.

Such a construction lies well within the avowed purposes of the Act.

A situation more paralyzing to the purpose and functioning of the Act would be difficult to imagine than a *carte blanche* to "bootlegger outfitters."

At least, Section 25 should be liberally construed. The Act itself (Section 3, Title II) bespeaks a liberal construction for all of its provisions to the end that the use of intoxicating liquor as a beverage shall be prevented. Probably with this section in mind, this Court has already said (*Donnelley* v. *United States,* 276 U. S. 505, 512):

> The rule that penal statutes are to be strictly construed in favor of persons accused is not violated by allowing the language to have its full meaning where that construction is in harmony with the context and supports the policy and purposes of the enactment.

So construed, Section 25 includes preparation for the market. The property here involved is readily designed for that purpose.

III

DECISIONS UNDER THE TARIFF ACTS ARE NOT CONTROLLING

It should be pointed out that this Court has heretofore considered the question of whether, under certain statutes, bottles, corks, and tin foil are articles used in the manufacture of intoxicating liquor (beer). But we submit that the purpose of the statutes that were construed was so foreign to the purpose of the National Prohibition Act which contains the same construed words, that

those decisions holding that bottles and corks are not used in manufacturing liquor (beer) are in no way controlling of the question in the case at bar—and for the reasons hereinafter set forth.

One of the principal cases is *Jos. Schlitz Brewing Co.* v. *United States,* 181 U. S. 584. That was a suit for drawback of duties paid on imported hops, barley, bottles, and corks used in connection with the manufacturing, bottling, and exportation of beer. The question was whether these were "imported materials * * * used in the manufacture of articles manufactured or produced in the United States" and subsequently exported, within the meaning of Section 25 of the Tariff Act of October 1, 1890, c. 1244, 26 Stat. 567, 617, commonly known as the McKinley Act, which section read:

> where imported materials on which duties have been paid, are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties.

Claimant's contention was that there was a difference between the manufacture of ordinary beer and the manufacture of beer bottled for export, and that in the manufacture of the latter kind of beer the bottles and corks, because of the particular use made of them, were in fact used in the "manufacture" of the beer. The two processes of manufacture are fully set out in the report of the case in the

Court of Claims. 35 C. Cls. 110. In passing on the contention the Court of Claims, though conceding that from one point of view the bottle is as much an element of the intended product as the peculiar kind of beer which it contains, held that under the authorities cited, the bottles were a finished product and not "materials used" in the combination which was the subject of suit.

Upon appeal this Court, in affirming the Court of Claims, held that the language of the statute meant that the "imported materials" must enter into and form ingredients of the manufactured article; that beer was the article manufactured; that "bottled beer" was still beer; that hops and barley formed such ingredients but bottles did not; that they were not "imported materials" but finished products, and only an incasement. Yet this Court indicated that the bottled beer was not "finally manufactured" and ready for market until the bottles had been used in the manner which claimant contended made the bottles and corks "materials * * * used in the manufacture of" the beer, when it said (p. 588):

> The fact that the beer must be steamed after bottling to a point necessary to kill the germs of yeast, and for that purpose must be enclosed in some vessel to prevent the escape of the carbonic acid gas, only *shows that the beer is bottled before it is finally manufactured and ready for the market.* (Italics ours.)

The word "manufacture" or "manufactured" in Tariff Acts was interpreted in the following cases: *Wheeler* v. *United States,* 75 Fed. 654, decided 1896; *Tide Water Oil Co.* v. *United States,* 171 U. S. 210, decided 1898; *Beadleston* v. *United States,* 104 Fed. 295, decided 1899; *Jos. Schlitz Brewing Co.* v. *United States,* 181 U. S. 584, decided 1901; *Anheuser-Busch Brewing Assn.* v. *United States,* 207 U. S. 556, decided 1908.

The same section (Sec. 25, Tariff Act of October 1, 1890) and the same words interpreted in the *Schlitz case* were involved in the *Wheeler, Beadleston,* and *Anheuser-Busch cases,* all relating to bottles and corks. The Court's decisions were uniform to the effect that *within the meaning of that section* the bottles and corks were not " materials " used in the "manufacture" of beer.

But the *Schlitz* and other cases cited above all involved interpretation of language in a Revenue Act, and the language was interpreted with the purposes of such Acts and rules of statutory construction thereof in mind.

Revenue laws should be construed so as most effectively to accomplish the intention of the legislature in passing them. *Taylor* v. *United States,* 3 How. 197, 210.

The predominant use to which articles are applied determines their character within the Tariff Act. *Hartranft* v. *Langfeld,* 125 U. S. 128.[1]

[1] For tariff purposes, coverings such as barrels (*Belcher* v. *Linn,* 24 How. 533), boxes (*Magone* v. *Rosenstein,* 142 U. S.

The idea that runs through the Tariff Act of 1890 (the Act under construction in the *Schlitz case*) is that of protection of American manufacturers. *Arnold* v. *United States*, 147 U. S. 494, 497. It is submitted that this is the purpose of most tariff legislation.

A claim for drawback of duty on imports is within the rule that exceptional privileges or exemptions from the general operation of law must be *strictly construed and doubts resolved against* the claimant for drawback. *United States* v. *Allen*, 163 U. S. 499, 504.

Courts recognize these rules where construction of revenue statutes are involved. The Circuit Court of Appeals for the Sixth Circuit in *Central Trust Co.* v. *George Lueders & Co.*, 221 Fed. 829, reviewing the foregoing cases in connection with interpretation of "manufacturing," pointed out that the interpretation in them was technical, saying (p. 839):

> *Considering the purpose of the statute,* we think it more natural to conclude that the Legislature used the term "manufacturing establishment" in its ordinary sense, rather than in its technical meaning, as used in relations to which the object of the statute is

604), filled glass bottles (*Merritt* v. *Stephani*, 108 U. S. 106), bottles containing beer (*Schmidt* v. *Badger*, 107 U. S. 85), bottles containing wine (*DeBary* v. *Arthur*, 93 U. S. 420), are customarily regarded as separate articles from the contents thereof, and are taxable or not as the statute may require.

entirely foreign, viz., *tariff cases* and *tax exemptions*. (Italics ours.)

Thus the claim in the *Schlitz* and other cases above was for an exceptional privilege or exemption, and the ruling that bottles and corks are not used in manufacturing beer was made under the rule of strict construction of the statutory language in a Revenue Act. But if necessary in order to carry out the intention of Congress, courts will liberally construe the language of a statute. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *Schlemmer* v. *Buffalo, etc., Ry.*, 205 U. S. 1. And in *Friday* v. *Hall & Kaul Co.*, 216 U. S. 449, holding that the intention of Congress was to be regarded, this Court liberally construed "manufacturing" as used in the Bankruptcy Act.

The word "property" in the language involved in the case at bar is more comprehensive than the word "materials" which was involved in the *Schlitz* and other cases. Under the revenue statutes "materials" and "ingredients" were, in effect, held to be synonymous. To hold that "property" in Section 25, Title II, National Prohibition Act, was used synonymously with "ingredients" would so narrow the scope of the section as to defeat the purpose of Congress. The words involved in the case at bar are given the narrow meaning only in cases construing Revenue Acts, the objects of which are entirely foreign to the object of the National Prohibition Act; and it is submitted that in view of the policy and intention of Congress in enacting

the latter Act, the *Schlitz* and other cases, *supra*, decided under the rules of strict construction, are not decisive of the question here involved.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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